DAVID E. CLARENBACH
REPRESENTATIVE
78th District
(East and Central Madison)

Capitol Address:
422 North-State Capitol
Madison, Wisconsin 53702
Telephone:
(608) 266-8570

WISCONSIN LEGISLATURE
ASSEMBLY CHAMBER
MADISON
53702

MEMBER:
Committee on Consumer Affairs
Committee on Elections
Committee on Administrative Rules
Committee on Judiciary

Dear Fellow Legislator:

This is just a short note to bring to your attention the results of a recently released Harris Poll on the public's concern about computers and how they affect an individual's right to privacy. In that poll a clear majority (54%) of those questioned felt that computers did indeed pose a serious threat to their privacy. This is an increase of 13% over last year's poll in which only 41% of those questioned felt that computers infringed upon their privacy.

In response to this growing concern, we passed AJR 47, which directed the Legislative Council to study the issue of how state and local governments collect and use information they gather from their citizens. A Special Committee on Privacy of Personal Records, which I chaired, produced a series of recommendations and suggestions that became Assembly Bill 400 last session.

AB 400 was unanimously approved by the Internal Management Committee earlier this year, but unfortunately, due to the late action by the Committee, the bill did not reach the floor for debate prior to our adjournment.

The bill will be reintroduced at the beginning of the January legislative session, probably by the Legislative Council. If you have any questions or need further information about the privacy of personal records, please feel free to contact me.

Sincerely,

DAVID E. CLARENBACH
State Representative

REP. MICHAEL FERRALL

REPRESENTATIVE
62nd District, Racine

1816 Wisconsin Avenue
Racine, Wisconsin 53403

Room 232 North
State Capitol Building
Madison, Wisconsin 53702
Telephone: (608) 266-0315

WISCONSIN LEGISLATURE
ASSEMBLY CHAMBER
MADISON
53702

ASSISTANT MAJORITY LEADER

CHAIRMAN:
Committee on Education

VICE CHAIRMAN:
Joint Committee on Administrative Rules

MEMBER:
Committee on Commerce and Consumer Affairs
Regional Council for Consumer Affairs
Governor's Task Force on Mass Transit
Education Commission of the States
Council of State Governments' Education Committee
State Advisory Committee for Career Education

file
privacy

January 11, 1977

Dear Colleague:

I am contacting you to invite your co-sponsorship of my now famous, and what I trust will be my final, privacy bill (copy attached) that once and for all will establish this important principle as a common law, actionable right in the State of Wisconsin.

This proposal is identical to Assembly Substitute Amendment 1 to my 1975 Assembly Bill 232, which was formulated after a series of discussions with media representatives who were concerned that the bill not jeopardize first amendment freedoms.* The resulting proposal thus reflects an attempt to address these legitimate concerns, without in any way providing the communications media with an exemption from the purview of the law.

This version of the bill was recommended for passage by a 7-2 vote of the Assembly Judiciary Committee, but time ran out before the Assembly was able to consider it. Supporters included such diverse groups as the Wisconsin Civil Liberties Union, the Milwaukee Junior Bar Association and the Wisconsin Chiefs of Police Association.

To provide a brief background, Wisconsin is one of only three states in the country which specifically have rejected the invasion of privacy as an actionable tort. (The other two states are Rhode Island and Nebraska). No fewer than five times, the Wisconsin Supreme Court has refused to determine a case on the basis of privacy until the State Legislature legally recognized such a right.

The most celebrated of these cases involved a woman who was photographed in the restroom of defendant's tavern (Yoeckel v. Samonig, 272 Wis 430 (1956)). Plaintiff complained that the taking of the photograph caused her "great mental anguish, embarrassment and humiliation," and that when she returned to the bar room, the owner was circulating to other patrons pictures he had taken of women using the toilet. Notwithstanding the lurid circumstances, the Wisconsin Supreme Court, in a decision William Prosser has termed"appalling," rejected her case on the grounds

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*Relative to the first amendment aspect of privacy legislation, I am enclosing a memorandum prepared on 2/25/76 by Staff Attorney Jim Fullin on the "Impact of Recent 1st Amendment Cases on Tort of Invasion of Privacy."

that an actionable right of privacy does not exist in Wisconsin. The Court held that "if such a right is deemed necessary or desirable, such right should be provided for by action of our Legislature and not by judicial legislation on the part of our courts."

To date, the Legislature has not acted to establish this right. Thus, despite a few recent developments such as the "emotional stress" defense affirmed in Alsteen v. Gehl (2d 249 (1963)) which have indirectly aided the protection of privacy, its recognition as a broad and independent principle is still lacking in Wisconsin, and recourse from privacy violations is consequently uncertain and imperfect. As likely as not, the same court verdict would be given today if the Yoeckel circumstances were repeated. Clearly, legislation is long overdue.

The attached proposal would accomplish this objective by providing that "the right of privacy recognized (in Wisconsin) is the common law right of privacy." Deliberately, the elements of a privacy tort are not spelled out in order that the courts may evolve the substance of the right on a case-by-case basis with reference to judicial decisions and legal developments in other jurisdictions.

In fact, privacy law is already well-defined by case law and legal scholars (see Prosser and the American Law Institute, for example) to the point where a definition of the right to privacy is unnecessary and would only reduce the flexibility of the law.

The experiences of such states as New York with specific language indicate that a detailed statutory definition leads to administrative difficulties and increased court workloads.

By contrast, inclusive language such as the attached proposal contains, ensures that no major areas of this right are left unprotected, and permits the law to evolve with time and changing circumstances. This way the right of privacy can develop as have our other major freedoms--speech, expression, religion and so on--without the handicapped of narrow statutory requirements or administrative regulations that would restrict its application and growth.

In conclusion, I very much hope to have your support and co-sponsorship, and will have my Aide, Eileen Vandoros, get in touch with you about your intentions.

Enc.

AN ACT to amend 893.21 (2), 895.01 (1) and 895.02; and to create 893.19 (10) and 895.50 of the statutes, relating to limitation of commencement of action, cause of action for right of privacy, damages and survival of actions.

Analysis by the Legislative Reference Bureau

This bill creates a cause of action for invasion of privacy and provides remedies which a court may grant. It also prescribes statutory limitations for invasion of privacy actions, including actions based on the improper interception and disclosure of a wire or oral communication. The right of privacy recognized is the common law right of privacy, which will be subject to the defenses of absolute and qualified privilege.

Survival of the cause of action means the cause of action does not terminate by the occurrence of any event (such as the death of a defendant). This bill provides that in all actions which survive under s. 895.01 (1) of the statutes, a plaintiff will be entitled upon judgment for damages including the amount by which a deceased defendant was unjustly personally enriched from goods taken.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 893.19 (10) of the statutes is created to read:

893.19 (10) An action under s. 968.31.

SECTION 2. 893.21 (2) of the statutes is amended to read:

893.21 (2) An action to recover damages for libel, slander, assault, battery, invasion of privacy or false imprisonment.

SECTION 3. 895.01 (1) of the statutes is amended to read:

895.01 (1) In addition to the causes of action which survive at common law the following shall also survive: Causes of action for the recovery of personal property or the unlawful withholding or conversion ~~thereof~~ of personal property, for the recovery of the possession of real estate and for the unlawful withholding of the possession ~~thereof~~ of real estate, for assault and battery, false imprisonment, invasion of privacy, violation of s. 968.31 (2) (d) or other damage to the person, for all damage done to the property rights or interests of another, for goods taken and carried away, for damages done to real or personal estate, equitable actions to set aside conveyances of real estate, to compel a reconveyance ~~thereof~~ of real estate, or to quiet the title ~~thereto~~ to real estate, and for a specific performance of contracts relating to real estate. Causes of action for wrongful death shall survive the death of the wrongdoer whether or not the death of the wrongdoer occurred before or after the death of the injured person.

SECTION 4. 895.02 of the statutes is amended to read:

895.02 MEASURE OF DAMAGES AGAINST EXECUTOR. When any action mentioned in s. 895.01 (1) shall be prosecuted to judgment against the executor or administrator the plaintiff shall be entitled to recover only for the value of the goods taken including any unjust enrichment of the defendant, or for the damages actually sustained, without any vindictive or exemplary damages or damages for alleged

outrage to the feelings of the injured party.

SECTION 5. 895.50 of the statutes is created to read:

895.50 RIGHT OF PRIVACY. (1) The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:

(a) Equitable relief to prevent and restrain such invasion, excluding prior restraint against constitutionally protected communication privately and through the public media;

(b) Compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and

(c) A reasonable amount for attorney's fee.

(2) The right of privacy recognized under this section is the common law right of privacy, subject to the defenses of absolute and qualified privilege with due regard for the maintenance of freedom of communication privately and through the public media.

(3) Compensatory damages are not limited to damages for pecuniary loss, but shall not be presumed in the absence of proof.

(End)

R. MICHAEL FERRALL
State Representative

ASSISTANT MAJORITY LEADER

File: Privacy

WISCONSIN LEGISLATURE
ASSEMBLY CHAMBER
MADISON
53702

Clarenbach
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TO: Members of the Assembly

FROM: R. Michael Ferrall

RE: Privacy Bill (AB 216 vs. the Media Version)

Soon my privacy bill, AB 216, will be coming up for consideration by the Assembly. The issue will require your decision as to whether privacy should be recognized in Wisconsin, and if so, your choice between my version (AB 216, as amended by Assembly Amendments 1 and 3) and the media proposal (Assembly Amendment 2), introduced by Representative Behnke.

Relative to the need for a right of privacy in Wisconsin, I am enclosing (1) a brief summary of the history and rationale behind AB 216; and (2) a letter of support from Zigurds Zile, Professor of Law at the UW-Madison, who has been actively involved in the development of this bill.

On the question of my version vs. the media version, I am providing a brief comparison and critique which I hope will be helpful to you in making your decision. If you have any additional concerns or unanswered questions, please do not hesitate to get in touch with me.

Assembly Bill 216	A Am 2 (Media Version)
KEY DIFFERENCE	
* Privacy is established as a common law, actionable right but its definition would not be spelled out in the statutes. Instead, litigants and the courts would use the definitions established previously in case law by the U.S. Supreme Court and other courts. We have not provided the definition of libel or slander in our statutes, relying on previous case law to give us the meaning.	* Provides a statutory definition of the right by specifying three areas which would constitute invasions of privacy: (1) intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; and (3) publicity given to another's private life.
ADVANTAGES	
* Ensures adequate protection of all aspects of privacy.	
	DISADVANTAGES
	* These three areas of privacy plus a fourth are already well established in case law. To put this language in the statutes would only add language we already know.

* Allows privacy law to develop flexibly, with time and changing circumstances, as have our other major freedoms such as speech, expression and religion. A report by the British Section of the International Commission of Justice (1970) found that "the scope of privacy is governed to a considerable extent by the standards, fashions, and mores of the society of which we form part, and these are subject to constant change, especially at the present time."

* Reaffirms first amendment freedoms but without providing an exemption for the media. (The bill specifically provides for "due regard for the maintenance of freedom of communication privately and through the public media.")

* Narrows the protection against privacy invasions, since any circumstances that could not be fit within the three defined areas would be excluded.

* Removes future flexibility to deal with unanticipated situations, and thus would hamper expansion of privacy law in Wisconsin.

* Tends to exempt the media by (1) omitting from the definition a major element of privacy--the "false light" category recognized by acknowledged tort expert William Prosser in Law of Torts; and (2) modifying recent privacy case law involving media liability by requiring proof of "reckless disregard" of newsworthiness rather than the truth or falsehood of the statement.

RESPONSE TO MEDIA CRITICISMS OF AB 216

(1) OBJECTION that the bill's broad, common law recognition of privacy would allow the courts too much discretion, thus abrogating the responsibility of the Legislature to establish specific guidelines on the subject.

REJOINDER:

*At least 35 states recognize a common law of privacy, and the media have been unable to provide any evidence that the media have been hampered as a result.

*Leaving the establishment of legal standards and definitions to the courts is common and proper and has precedence in Wisconsin in such areas as comparative negligence (Wis. Stats. 895.045), libel, slander and even free speech, freedom of religion and freedom of the press. This has been necessary where public rights are involved and one right must be balanced against another.

*Where the language of a statute is broad, the courts typically look at case law from the U.S. Supreme Court and other jurisdictions. In the case of privacy, the available case law and guidelines are substantial, as contained in the Restatement of Torts, Sec. 867, and the 23-page chapter on privacy in Prosser's Law of Torts. (I would be happy to supply you with a copy of Prosser's privacy chapter, upon request.)

*The pitfalls of narrow language are far greater than broad language: The experience of such states as New York with specific language indicate that a detailed statutory definition leads to administrative difficulties and increased court workloads.

*Regardless of what definitions or standards are placed in the statutes, the courts will always look to the case law to obtain established definitions and standards.

(2) OBJECTION that the bill would pave the way for a flood of costly nuisance suits that would bankrupt Wisconsin's media--particularly the small, rural newspapers and radio stations.

REJOINDER:

*This concern is fully and effectively addressed by Assembly Amendment 1 (copy attached) which has been recommended for adoption by the Assembly Judiciary Committee and provides for the award to defendant of "reasonable fees and costs relating to the defense of the action" if the court determines the privacy action to be frivolous and without merit.

*In any case, nuisance suits have not resulted in the other 35 or so states which have a common law of privacy, nor have they been a feature of a comparably broad right of action which has existed for 14 years in Wisconsin under the "emotional distress" cause of action affirmed in Alsteen v. Gehl, 21 Wis. 2d 349 (1963).

(3) OBJECTION that the bill would abridge the freedom of the press, and thus the "public's right to know."

REJOINDER:

*The bill specifically provides for "due regard for the maintenance of freedom of communication privately and through the public media," and excludes "prior restraint against constitutionally protected communication privately and through the public media."

*Wisconsin courts would be constrained by federal court rulings which have reaffirmed first amendment freedoms and even weighted the balance of rights in favor of the press (Time, Inc. v. Hill, 385 U.S. 374 (1967)).

R. MICHAEL FERRALL

REPRESENTATIVE
62nd District, Racine

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Racine, Wisconsin 53403

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Telephone: (608) 266-0315

WISCONSIN LEGISLATURE
ASSEMBLY CHAMBER
MADISON
53702

ASST. MAJORITY FLOOR LEADER

CHAIRMAN:
Committee on Education

VICE CHAIRMAN:
Joint Committee on Administrative Rules

MEMBER:
Committee on Commerce and Consumer Affairs
Regional Council for Consumer Affairs
Governor's Task Force on Mass Transit
Education Commission of the States
Council of State Governments' Education Committee
State Advisory Committee for Career Education

February 22, 1977

Dear Colleague:

The following statement will provide a brief summary of the history and rationale behind my privacy bill, AB 216, which calls for the establishment of this important principle as a common law, actionable right in the State of Wisconsin.

This proposal is identical to Assembly Substitute Amendment 1 to my 1975 Assembly Bill 232, which was formulated after a series of discussions with media representatives who were concerned that the bill not jeopardize first amendment freedoms.* The resulting proposal thus reflects an attempt to address these legitimate concerns, without in any way providing the communications media with an exemption from the purview of the law.

This version of the bill was recommended for passage by a 7-2 vote of the Assembly Judiciary Committee, but time ran out before the Assembly was able to consider it. Supporters included such diverse groups as the Wisconsin Civil Liberties Union, the Milwaukee Junior Bar Association and the Wisconsin Chiefs of Police Association.

To provide a brief background, Wisconsin is one of only three states in the country which specifically have rejected the invasion of privacy as an actionable tort. (The other two states are Rhode Island and Nebraska). No fewer than five times, the Wisconsin Supreme Court has refused to determine a case on the basis of privacy until the State Legislature legally recognized such a right.

The most celebrated of these cases involved a woman who was photographed in the restroom of defendant's tavern (Yoeckel v. Samonig, 272 Wis 430 (1956)). Plaintiff complained that the taking of the photograph caused her "great mental anguish, embarrassment and humiliation," and that when she returned to the bar room, the owner was circulating to other patrons pictures he had taken of women using the toilet. Notwithstanding the lurid curcumstances, the Wisconsin Supreme Court, in a decision William Prosser has termed "appalling," rejected her case on the grounds

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* Relative to the first amendment aspect of privacy legislation, I am enclosing a memorandum prepared on 2/25/76 by Staff Attorney Jim Fullin on the "Impact of Recent 1st Amendment Cases on Tort of Invasion of Privacy."

that an actionable right of privacy does not exist in Wisconsin. The Court held that "if such a right is deemed necessary or desirable, such right should be provided for by action of our Legislature and not by judicial legislation on the part of our courts."

To date, the Legislature has not acted to establish this right. Thus, despite a few recent developments such as the "emotional distress" cause of action affirmed in Alsteen v. Gehl 21 Wis. (2d 349 (1963)) which have indirectly aided the protection of privacy, its recognition as a broad and independent principle is still lacking in Wisconsin, and recourse from privacy violations is consequently uncertain and imperfect. As likely as not, the same court verdict would be given today if the Yoeckel circumstances were repeated. Clearly, legislation is long overdue.

Assembly Bill 216 would accomplish this objective by providing that "the right of privacy recognized (in Wisconsin) is the common law right of privacy." Deliberately, the elements of a privacy tort are not spelled out in order that the courts may evolve the substance of the right on a case-by-case basis with reference to judicial decisions and legal developments in other jurisdictions.

In fact, privacy law is already well-defined by case law and legal scholars (see Prosser and the American Law Institute, for example) to the point where a definition of the right of privacy is unnecessary and would only reduce the flexibility of the law.

The experiences of such states as New York with specific language indicate that a detailed statutory definition leads to administrative difficulties and increased court workloads.

By contrast, inclusive language such as AB 216 contains, ensures that no major areas of this right are left unprotected, and permits the law to evolve with time and changing circumstances. This way the right of privacy can develop as have our other major freedoms--speech, expression, religion and so on--without the handicap of narrow statutory requirements or administrative regulations that would restrict its application and growth.

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WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Room 147 North, State Capitol, Madison 53702
Telephone (608) 266-1304

DATE: February 25, 1976

TO: ASSEMBLY JUDICIARY COMMITTEE

FROM: Jim Fullin, Staff Attorney

SUBJECT: Impact of Recent 1st Amendment Cases on Tort of Invasion of Privacy

In the landmark case of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) the Supreme Court held that the First Amendment prohibits strict application of the common law of defamation against news media for comments concerning public officials. Although at common law the defendant is liable for publishing false and defamatory statements even though he is reasonably prudent in investigating their truth, the Court held that invoking this doctrine against a critic of official conduct would lead to self-censorship inconsistent with American free press traditions. Therefore, said the Court, only if the critic acts with "actual malice," defined as knowledge that his statements are false or reckless disregard to their truth or falsehood, will he be liable in tort to the defamed public official.

Three years later, the Court extended the same privilege to defamatory criticism of "public figures" such as a retired Army general and a football coach at a major university, who, although not public officials, had similarly become involved in the resolution of important public questions. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) Associated Press v. Walker, 388 U.S. 162 (1967).

Ultimately the Sullivan rule was extended to all defamatory statements concerning "matters of general or public interest" by a plurality of a fractionalized court in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). After this case, even a private citizen involuntarily associated with a matter of general interest must prove actual malice on the part of the defendant in order to recover for defamation.

These cases each construed the impact of the 1st Amendment on defamation actions. Since the tort of invasion of privacy is closely related to defamation, it was to be expected that Sullivan and its progeny would have an impact on the development of privacy law as well.

If we may accept Prosser's assertion that, "Invasion of privacy is not one tort, but a complex of four," namely intrusion, public disclosure of private facts, false light in the public eye, and appropriation, the 3rd of these most nearly approximates defamation. Indeed, "false light" cases are often referred to as involving "nondefamatory falsehood."

It was to such cases that the U.S. Supreme Court held the "actual malice" rule of Sullivan applicable in Time, Inc. v. Hill, 385 U.S. 374 (1967). Plaintiffs in thatcase had been victims of a crime which was later reenacted for magazine photographers to illustrate an article relating the crime to a novel and play dramatizing and embellishing the actual occurrences without identifying the true names of the victims. The New York state courts awarded the plaintiffs damages, but the Supreme Court reversed.

The Court noted that the plaintiffs had become newsworthy and lost their right to recover for truthful statements about their ordeal, i.e., for the 2nd type of privacy tort, or public disclosure of private facts. Furthermore, said the Court, anticipating Rosenbloom, the story of the crime had become a "matter of public interest," and as such even a false account thereof was not actionable unless the plaintiffs could show "actual malice" as required by Sullivan.

In the years since Hill there has been much confusion over the extent to which its rationale might be applied to the class of the tort of invasion of privacy known as "public disclosure of private facts." Here the 1st Amendment "public interest" doctrine is not so much an affirmative defense as the denial of the central element of the tort itself, namely the "private" nature of the fact disclosed.

One commentator has remarked that

> Numerous plaintiffs have, with little success, sought damages for publication of private information in the 7 years since Time, Inc. v. Hill. The first amendment considerations raised by the Supreme Court in the 1967 decision have appeared to strengthen the privilege of newsworthiness. Generally, the privilege will protect a publication which is in the public interest, which concerns a willing or unwilling public figure, or which is a report taken exclusively from a public record. The bulk of decisions rendered in the area of publication of private facts since Time, Inc. v. Hill ... demonstrate a continuing desire to preserve the newsworthiness privilege. Pember, Privacy and the Press Since Time, Inc. v. Hill, 50 Wash. L. REV. 57, 69-70.

It has long been accepted that a person who has become a subject of public interest, whether willingly or unwillingly, loses any right of action for accurate publicity given to him on account thereof. Jones v. Herald Post Co., 230 KY 227, 18 S.W. 2d 972 (1929). This doctrine has become "constitutionalized" with regard to public officials and public figures. Garrison v. Louisiana, 379 U.S. 64 (1964). In the most recent case in this area, the Court has extended the 1st Amendment protection to the publication of facts which are matters of public record, since such facts are presumed to be of public interest, even though pertaining to private individuals. Cox Broadcasting Corp. v. Cohn, ___ U.S. ___, 95 S. Ct. 1029 (1975).

The Cox case is particularly significant as an indication that truthful publicity will be protected even where no public official or public figure is involved. In the defamation area, the Court has retreated somewhat from the

"public concern" test of Rosenbloom, and returned to the "public official or public figure" standard for applying the Sullivan rule. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Where plaintiffs do not qualify as public officials or public figures, they need show only that the defendant was negligent, as opposed to knowing or reckless, with regard to the truth of the defamatory statement, said the Gertz court.

However, this holding appears limited to defamation case. The opportunity to extend it to "false light" privacy suits was implicitly rejected in Cantrell v. Forest City Publishing Co., ____ U.S. ____ 95 S. Ct. 465 (1974).

JF:tmr;mld;dko

UNIVERSITY OF WISCONSIN-MADISON

LAW SCHOOL
Madison, Wisconsin 53706

February 7, 1977

State Representative James A. Rutkowski
Chairman
Assembly Committee on Judiciary
State Capitol
Madison, Wisconsin 53702

Dear Representative Rutkowski:

It has come to my attention that AB 216 has been scheduled for a public hearing on February 8. Unfortunately, other commitments will prevent me from appearing personally. This letter, therefore, is intended to express my strong support of the bill.

The Committee should know that I was an early collaborator on AB 1165 and AB 232 during the previous two legislatures and, on two occasions, spoke in their favor before Assembly and Senate Committees on Judiciary. I have appraised the probable impact and value of the proposed statutory changes as both a citizen and a teacher of law (including the area of the law of privacy) and have concluded that AB 216 would close a number of gaps in remedies available to individuals for invasion of their right of being left alone in an ever-shrinking private sphere. The encroachments on this sphere are not, in the main, by one's neighbors but by agglomerates of enormous public and commercial power. Piecemeal special-purpose legislation and the creative use of existing doctrines of the common law can go a long way toward meeting the problem. However, there remains a residuum of situations having a great potential of harm that only a general statute such as AB 216 can meet.

To my mind, AB 216 merely allows the courts of this state to rejoin the mainstream of the American common law with respect to the right of privacy. Such development will remain under the constraints of the First Amendment which extends broad protection to the communication of information and ideas both privately and through public media. The import of the bill is to require the communicators to act more carefully and responsibly outside the area of constitutionally protected mistake and misjudgment. I see the statute operating as a general deterrent by virtue of its being there, without a significant increase in actual litigation. The danger of "nuisance suits" is easily overstated. New torts such as intentional and negligent infliction of emotional

distress (both recognized in Wisconsin) have not deluged the courts with trivial litigation. Similarly, states which have long recognized a tort action for invasion of the right of privacy continue to enjoy the blessings of a vigorous press, other mass media and governmental and financial institutions. The woes of their courts can hardly be attributed to the commitment to individuals' privacy.

I urge the Committee to act favorably on AB 216.

Sincerely,

Zigurds L. Zile
Professor of Law

ZLZ:sh
cc: State Representative R. Michael Ferrall

ASSEMBLY AMENDMENT 1,

TO 1977 ASSEMBLY BILL 216

March 2, 1977 – Offered by Representative BEAR.

Amend the bill as follows:

1. On page 3, after line 17, insert:

"(4) (a) If judgment is entered in favor of the defendant in an action for invasion of privacy, the court shall determine if the action was frivolous. If the court determines that the action was frivolous, it shall award the defendant reasonable fees and costs relating to the defense of the action.

(b) In order to find an action for invasion of privacy to be frivolous under par. (a), the court must find either of the following:

1. The action was commenced in bad faith or for harassment purposes.

2. The action was devoid of arguable basis in law or equity.".

(End)

STATE OF WISCONSIN

LEGISLATIVE COUNCIL
ROOM 147 NORTH, STATE CAPITOL
MADISON, WI 53702
TELEPHONE (608) 266—1304

Bonnie Reese
Executive Secretary

September 26, 1979

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in AB 321
bill folder

OCT -1 RECD

Mr. Robert W. Lang
Director
Legislative Fiscal Bureau
Room 107 South, State Capitol
Madison, Wisconsin 53702

Dear Bob:

The Legislative Council is the primary author of 1979 Assembly Bill 321. As Chairman of the Council, I hereby request, pursuant to Joint Rule 48 (3), that your Bureau prepare a Supplemental Fiscal Estimate on Assembly Bill 321 as affected by the two amendments introduced and adopted by the Assembly Committee on Government Operations at its September 18 executive session.

One of the amendments, LRB-7607/1, exempts student records at all levels of public education from regulation under the Bill and requires instead that these be kept in conformity with the federal "Buckley Amendment." Since this law already covers all educational institutions receiving federal funds, I seriously question the University of Wisconsin System's estimate of an initial cost of $1.6 million (58 positions) and continuing costs of $720,000 (25 positions) to implement Assembly Bill 321. 1979 Senate Bill 107, which is virtually identical to Assembly Bill 321, as amended by LRB-7607/1, received almost the same fiscal estimate from the University System.

While the amendments adopted by the Assembly Committee on Government Operations contain other provisions designed to reduce the fiscal impact of the Bill on all government agencies which should be analyzed, I hope your Bureau will give priority to re-estimating the impact of the amended Bill on University System costs, which were out of all proportion to the costs projected by other agencies. Representative Tuczynski hopes to schedule the Bill for executive action on October 16. It would be my hope that a preliminary analysis would be available to the Committee by that time.

Very truly yours,

Wm. A. Bablitch

Senator William A. Bablitch
Chairperson
Wisconsin Legislative Council

WB:jmm
cc: Rep. David Clarenbach
Rep. Phillip Tuczynski
Miss Bonnie Reese

JAN 2 5 REC'D

LYNN S. ADELMAN
STATE SENATOR
SENATE OFFICE: STATE CAPITOL, MADISON, WISCONSIN 53702. PHONE 608/266-5400.
RESIDENCE: 1945 S. PARKWOOD LANE, NEW BERLIN, WISCONSIN 53151. PHONES—OFFICE: 414/278-8340; HOME: 414/782-3183

January 21, 1983

Representative David Clarenbach
Room 422 North, State Capitol
Madison, WI 53702

Dear Dave:

How are you doing?

Enclosed is a copy of an editorial which I thought might be of interest to you. Maybe we should talk about privacy sometime.

Very truly yours,

Lynn Adelman
State Senator
28th District

LA:jas

E - Review - file under privacy

Big Brother Is Coming

An Editorial

One of the unfortunate results of computors is that they create a tendency for people to collect more information than they need, or in some cases should have.

The State Department of Health and Social Services is falling into this trap.

Beginning in 1983 the state will institute a computerized client information system called C.S.I.S.

Anyone who received inpatient, out-patient, residential services, etc. that are funded in whole or part with county or state funds, will end up in a computer in Madison, with a record of their name, birthdate, sex, kind of treatment and when and where it was received. This will be continuously updated.

The problem with the system is that for the first time, the state will be amassing a complete record, identifiable to an individual, of their treatment. Any agency participating in the system can, by reporting your name, date of birth and sex, find out when and what county provided you treatment. The state, by using the same information, could find out even more detailed treatment information.

Another bothersome element is that the client will have little knowledge of, and no control over, the system. Participating agencies will routinely supply the system with data, without necessarily indicating to the client that it is being done.

The public policy issue is whether it is really necessary to develop a system of client numbering and identification to provide the state the information it needs for monitoring and planning purposes.

The answer is no. The use of client numbers only produce one piece of information - "unduplicated count". This gives the state the ability to determine how many people use more than one service or make repeated use of a service. However, ninety-nine percent of the information the state might need for planning and monitoring purposes could be gained without requiring client names.

Because The Counseling Center of Milwaukee strongly believes in the right of people to receive services on a confidential basis, we will not participate in the system.

However, because many organizations might be forced into closing if they don't participate, it is important that people begin to express their concern on this issue. A good place to start is with your state legislator.

Meanwhile, if you are going for any kind of mental health, alcohol, or drug abuse services, and they want your name and date of birth, ask them who is going to get that information and insist that you are not authorizing anyone, other than the person you are seeing to have access to your records, without a written release signed by you.

Ted Seaver

PUBLISHED BY:

The Counseling Center Newsletter is published by The Counseling Center of Milwaukee, Inc.

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Ted Seaver, Executive Director

Local Support For Prevention Efforts

(Continued from page 2)

Barbara McCann of The Milwaukee Journal wrote a series of articles in April focusing on the Peer Advocates program at Marshall, the teacher inservice program at Wright, and the slide shows at 53rd Street School.

The PAY program was chosen by the Department of Health, Education and Welfare to be highlighted in their May/June edition of Sharing, a clearinghouse for improving the management of human services. As a result we have received more than 30 requests nationally from persons interested in more information about our programs.

With the help of United Way and four local foundations (Uhrig, Cudahy, Faye McBeath, and Richard Youth) we will be continuing this project in the 1982-83 school year. These programs are part of the larger Marshall Community Cluster Project which involves the cooperation of theMilwaukee Prevention Consortium, the Milwaukee Public Schools, the Junior League, and the Archdiocese of Milwaukee.

MICHELE G. RADOSEVICH
Room 419 South
State Capitol
Madison, Wis. 53702
(608) 266-5660

Riverside Drive North
Hudson, Wis. 54016

WISCONSIN LEGISLATURE
SENATE CHAMBER
MADISON
2

STATE SENATOR
Tenth Senatorial District

VICE CHAIRMAN:
Agriculture, Labor, & Aging

MEMBER:
Natural Resources

January 13, 1977

Rep. David Clarenbach
Room 112 North
State Capitol
Madison, Wis. 53702

Dear Representative Clarenbach,

Enclosed is a letter concerning the draft of the Legislative Council's proposed bill regarding the privacy of personal records.

In your role as Chairman of the committee that drafted this proposal, I would hope you could review the questions raised by Mr. Wurtzel. Do you have any comments regarding the points raised by Mr. Wurtzel? Have Mr. Wurtzel's concerns been satisfied by later drafts of this legislation?

Your assistance in this matter is appreciated!

Sincerely,

Michele Radosevich sd.

MICHELE G. RADOSEVICH
State Senator
Tenth Senatorial District

MGR:sjd

Enclosure: 1

send her copy of privacy bill when ready from Leg. Council

NORBERT K. WURTZEL, DISTRICT DIRECTOR

AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT ONE

AN AFFIRMATIVE ACTION EMPLOYER AND EDUCATIONAL INSTITUTION

620 WEST CLAIREMONT AVENUE
EAU CLAIRE, WISCONSIN 54701

January 6, 1977

Senator Michele Radosevich
State Capitol
Madison, WI 53702

We are very concerned regarding the Wisconsin Legislative Council Staff's draft No. WLCS 55/3 regarding the privacy of personal records.

We find this legislation to be very unrealistic and cannot envision being able to carry out the mission of an educational institution if it were enacted. Educational institutions are covered sufficiently under the Buckley Amendment. It is designed specifically for such institutions and they have learned to live with it--both its good and bad points. The legislation proposed is too all inclusive and it would render the school helpless. Specific points of concern are:

1. The definition of personal data is all inclusive. We could not even state that a student is enrolled without going through a tremendous amount of work and building an entirely new security system.

2. The nonuse of the social security number, unless required by federal or state administrative directive, would force major and drastic changes in our records system, which are unnecessary. The social security number is not misused by schools as far as I know, and it is a very efficient method or key to record keeping.

3. Permission in writing for all individual releases of information is impossible to administer.

As was mentioned above, educational institutions are now adequately covered by the Buckley Amendment. It is, in general, a workable piece of legislation. The state's proposal is far too restrictive, complex, and is detailed to the point where one could not administer it.

Your consideration in defeating the enactment of this proposed legislation would be greatly appreciated. If you have any questions regarding it, I would appreciate your contacting my office so that we might discuss it in detail.

Norbert K. Wurtzel
District Director

ms

The State of Wisconsin
Department of Justice
Madison
53702

Bronson C. La Follette
Attorney General

David J. Hanson
Deputy Attorney General

FILE

November 12, 1976

State Rep. David Clarenbach
Chairman
Legislative Council
Special Committee on Privacy of Personal Records
Room 112 North State Capitol
Madison, Wisconsin 53702

Dear Rep. Clarenbach:

On Monday, November 8, my office received a copy of the second draft of the "Goverment Information Practices Bill" (WLCS 55/2). It is my understanding that the committee intends to conduct a public hearing sometime in the near future for the purpose of receiving comments from the general public as well as from various state and local governmental agencies. I can well appreciate the committee's desire to have a satisfactory preliminary draft prepared prior to the public hearing. Because of the limited time available so far for review this is obviously an inappropriate moment to provide a full, detailed reaction to the proposed legislation.

However, I do wish to offer one suggestion to the committee which I believe deserves serious consideration for incorporation in a preliminary draft prior to public hearing. That suggestion is to provide an exemption from the coverage of the legislation for investigatory and prosecutorial information in the criminal justice system.

The need for such a "blanket" exemption is self-evident. Indeed, the summary prepared by the committee staff of similar legislation enacted in nine other jurisdictions indicates that, without exception, all exempt criminal and investigative records.

As presently drafted, the bill would provide a limited exemption for "personal data which relates to the investigation of prosecution of possible violations of law which the agency has authority to enforce, unless such personal information has been maintained for a period longer than reasonably necessary to conclude prosecution or other enforcement action." The exemption applies only to proposed sec. 19.57 "Access by Data Subject."

Even this limited exemption creates problems which should be avoided. For example, who is to determine when such information has been maintained for a period longer than "reasonably necessary" to conclude prosecution or other enforcement action? However, there is a strong possibility that by revealing such otherwise antiquated investigative material, law enforcement agencies might also be revealing confidential methods, strategies and practices of an investigative nature. Such information could provide a criminal with a great deal of insight into the nature of, and sources for, current or future investigations.

Other sections of the present draft which are not affected by the exemption from disclosure to the subject contain additional problems for law enforcement investigatory agencies:

1. Sec. 19.54 would preclude an agency from obtaining information necessary to its functions where such information might be provided by one spouse about the other spouse. The agency would have to demonstrate on an interview by interview basis the "compelling public need" for an interview of the spouse. The privileges have historically been limited to a judicial context and any extension of them to investigatory or even other administrative functions will severely hamper investigations.

2. Sec. 19.59 contains restrictions on the release of personal data. These restrictions present problems for the criminal investigator. Very often it is necessary to relate personal data regarding one individual to another individual in order to further an investigation. A witness or informant being interviewed might have to be provided with personal data on a suspect or another witness in order to be in a position to properly respond to the investigator's questions. As a practical matter, all such witnesses or informants could never be listed in a biennial report or disclosed to the subject.

These examples are illustrative of some of the difficulties which are likely to result from inclusion of information relating to criminal investigation and prosecution within the purview of this legislation. I would hope that the committee

would agree that an exemption for such activities is warranted and would include such an exemption in the draft of the legislation. If there are abuses in this area it seems to me that they should be addressed in separate legislation which can take account of the unique needs of law enforcement. It would be a shame to have the unique needs of law enforcement hinder passage of a bill which is otherwise good public policy long overdue.

At such time as you have completed a draft and hold your hearing, we will be glad to comment on other details in the legislation.

Thank you for your consideration of this problem.

Sincerely yours,

Bronson C. La Follette
Attorney General

BCL/um

cc: Members of the Special Committee
on Privacy of Personal Records